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No. 85-498

Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SANDRA ABERNATHY, *et al.*,

Petitioners,

v.

SAN JOSE TEACHERS ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

PETITIONERS' REPLY BRIEF

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3 January 1986

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PETITIONERS' REPLY BRIEF

I. THE QUESTIONS PRESENTED WERE DECIDED BY THE SUPREME COURT OF CALIFORNIA AND THOSE ISSUES WARRANT REVIEW BY THIS COURT.

This case arose when the respondent (union) sued the petitioners (teachers) for an agency-shop fee equal to the dues paid by a member of the union. From the beginning the teachers maintained that the actual amount spent for chargeable activities had to be determined before they could be required to pay anything to the union. On the other hand, the union maintained that it was entitled to a fee equal to the dues paid by a member and the uses made of the fees cannot be inquired into in

the collection suit. The teachers have consistently argued throughout the litigation that the result urged by the union would be a violation of both their First Amendment rights (free speech and association) and due process of law.

In answering the complaint in the trial court, the teachers raised constitutional defenses as follows:

> SECOND AFFIRMATIVE DEFENSE
>
> 14. Defendants hereby notify Plaintiff that, if they are required to pay any service fee to the Plaintiff, they object to their fees being used for any purposes other than collective bargaining, contract administration and grievance adjustment purposes.
>
> 15. Plaintiff, the California Teachers Association, and the National Education Association spend monies for other than collective bargaining, contract administration and grievance adjustment purposes including, but not limited to, political and ideological purposes unrelated to collective bargaining.
>
> 16. The notice indicated in Paragraph 14 places the burden of proving the amount it spends for collective bargaining, contract administration and grievance adjustment purposes on the Plaintiff, and Defendants demand strict proof thereof.
>
> * * * *
>
> FOURTH AFFIRMATIVE DEFENSE
>
> 18. That to require Defendants to pay the sums requested by the Complaint, which sums are equal to dues required to be paid by members of the Association, would deprive Defendants of rights, privileges and immunities secured to Defendants by

the Constitutions of the United States and the State of California, including, but not limited to, Defendants' rights of association and free speech, and right not to be deprived of property without due process of law.

FIFTH AFFIRMATIVE DEFENSE

19. That the relevant provisions of the California Government Code on which Plaintiff relies in bringing this action, including, but not limited to, California Government Code Sections 3540.1, 3543.2 and 3546, as enacted, as interpreted by the California Public Employment Relations Board, and as applied, are unconstitutional in that, among other things, their operation creates a chilling effect upon Defendants' exercise of their freedoms of speech, thought, conscience, assembly, petition, and association guaranteed by the Constitutions of the United States and the State of California, they are overbroad and encompass within their coverage compulsory financial support of activities and causes which are clearly protected by the First and Fourteenth Amendments of the United States Constitution and by provision of the Constitution of the State of California, they are susceptible of sweeping and improper application to protected activities in violation of the First and Fourteenth Amendments of the United States Constitution, and applicable provisions of the Constitution of the State of California, and their operation works a prior restraint upon Defendants' exercise of such constitutionally-protected rights.

And, in their prayer for relief the teachers requested:

2. That, in the event that the Court determines that Defendants are liable to the Plaintiff, the Court

> determine that such liability may not exceed a pro-rata share of the Plaintiff's costs of collective bargaining, contract administration and grievance adjustment.

In their Answer to the Petition For Hearing in the Supreme Court of California, the teachers relied on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *School Committee of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982), as well as other cases, to support their argument of the alleged First Amendment violation and also argued that, "Elementary considerations of due process require [the Supreme Court of California] to permit the defendants to show that the plaintiff is not entitled to what it is seeking." Answer, page 33.

In addition, in a letter brief to the Supreme Court of California dated September 10, 1984, the teachers cited *Hudson v. Chicago Teachers Union, Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S. Ct. 2700 (1985), and argued that:

> *Hudson* is particularly interesting since the fee there involved did *not* include the amount the union determined it spent on ideological and political activities unrelated to collective bargaining. Of course, the amount of summary judgment sought here does include those amounts so it is even more clear that the result sought by the [union] would be unconstitutional.

Citation, page 3.

Notwithstanding footnote 16 of the California Supreme Court's opinion, the factual record before the

court clearly showed that the union's internal procedure suffered from the same constitutional defect—sole control by the union from start to finish—which was the principal basis for the Seventh Circuit's opinion in *Hudson*.

It is apparent, therefore, that if the pay-first-litigate-later scheme in *Hudson* is constitutionally infirm, so is the scheme approved by the California Supreme Court in this case. In fact, the California scheme is even more suspect because it permits its courts to be the vehicle which precipitates the First Amendment violation. That system is, indeed, a perversion of the primary judicial function of the prevention of constitutional injury.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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